IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Continental National Bank, a corporation,	*Plaintiff in Error.*
vs.	
Mary Neville,	*Defendant in Error.*

Petition for Rehearing After Decision by the Court.

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To the Honorable Circuit Court of Appeals and to the Honorable Judges Thereof:

Comes now the plaintiff in error in the above entitled action, and petitions the court to set aside and vacate the decision and opinion heretofore rendered in the above entitled cause, on the 8th day of January, 1923, and to grant a rehearing thereof, and that the writ of error pending herein be reconsidered by the court.

This petition is based upon the following grounds, to-wit:

First: That the court erred in holding that the giving of the following instruction was not erroneous, to-wit:

"If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall, and duly endorsed by her, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall, but should have credited it solely to Mary Neville Birdsall."

Second: That the court erred in holding and deciding that said instruction could be read in connection with other instructions properly given, as a part of an entire charge, and not as a distinct and separate charge.

We respectfully urge that the opinion is in error on a question of law insofar as it is held that there was no conflict in the instructions given to the jury by the trial judge.

Set out below will be found the instructions which we urge are in conflict, and which we have designated "A" and "B" respectively. These are copied from transcripts of record, pages 82 and 83.

(*A*). "In receiving said deposit the defendant bank had a right to assume that any check presented to said bank for deposit was owned by the party presenting the check, provided the check was duly endorsed without limitation of the endorsement by the payee thereof, and the bank had no information which would put them upon notice to the contrary."

"The deposit slip, however, may be controlled by other evidence, that is to say, the deposit slip is not conclusive as a direction to the bank as to whom the deposit shall be made. Oral direction may be given where other instructions may show that the party intended the deposit should be made in the name of some other party than that on the deposit slip."

(*B*). "If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall, AND DULY ENDORSED BY HER, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall, but should have credited it solely to Mary Neville Birdsall."

The instruction above set forth, entitled "(B)", is a proposition complete and distinct in itself, as distinguished from any other part of the proceeding or following instructions. It contains the following exclusive and definite conditions:

(a) That the check was originally payable to plaintiff;

(b) That it was endorsed by plaintiff; and

(c) That the deposit slip was in the name of plaintiff.

Every one of these propositions was conceded to be true at the trial. The instruction expressly excluded the following propositions:

(v) That there was presented with the deposit slip a joint and several passbook;

(x) That the person presenting the check, deposit slip and passbook, requested that the deposit be entered upon the joint and several passbook;

(y) That the bank entered such deposit in the joint and several passbook and account in good faith, relying upon the endorsements; and

(z) That it was a custom among banks to accept deposit slips in the name of either of the joint depositors and credit them to the joint account.

Each of the latter propositions (v, x, y, z) excluded by the plain import of this instruction, was supported by evidence before the court.

The jury may have believed any one or all of the propositions excluded from this instruction, and would yet have been compelled to follow the court's mandate and render a verdict, as it did, for the plaintiff.

On the other hand, the court, in other parts of its instructions, told the jury that every one of the excluded propositions were a good ground for defense.

That we are correct in urging that this instruction was contradictory and necessarily misleading to the jury

is rendered more evident by the fact that the other instructions were given as abstract principles of law, while this particular instruction sets up a particular state of facts, giving the names of the parties and states that if these specific facts (a, b, c) are true (and they are not disputed), the verdict must be for the plaintiff.

As a further illustration of the correctness of the position which we take, let us assume that the court had stated in this instruction merely that if the original payee of the check had been the plaintiff, the verdict should be for the defendant. This would certainly be a bad instruction. Or if the court had instructed the jury merely that if the deposit had been made out in the name of the plaintiff, the verdict would have to be for the plaintiff. This would certainly be a bad instruction.

The only difference between this and the instruction as given, is that the one suggested omits only an *additional* fact.

Had the instruction contained any limitation, as if it had read:

"If you find the following to be the only facts in the case,"

then the instruction would have been reconcilable with the other instructions. Or if the instruction had read:

"If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall, and duly endorsed by her, and at the same time said check was

presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, *'then in the absence of other circumstances to control the disposition of the fund,'* the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall, but should have credited it solely to Mary Neville Birdsall,"

thus interpolating in the instruction, the very apt language used by the court in its opinion, to explain the meaning of the instruction, it would have been reconcilable with the balance of the charge.

Had such language been interposed into the instruction, its meaning would have been different, but without such language, its meaning could not have been understood by the jury in the light stated in the opinion of the court. The jurors were laymen, and not jurists, and could not be expected to add to or imply from the positive and unconditioned language of the trial judge, those things which the trial judge should have interposed by way of limitation, and which he did not interpose.

The Federal authorities require only that an exception to instructions shall be sufficiently definite to call the judge's attention to the particular matter objected to in order that he may have an opportunity to correct it.

First National Bank v. Hindman, 186 U. S. 483;
Morse v. Tilotson & Walcott Co., 255 Fed. 340.

It will be noted, however [Tr. page 84] that counsel for plaintiff in error specifically excepted to these instructions on the special ground of conflict.

Inconsistent or Contrary Instructions Constitute Reversable Error.

In 38 Cyc., page 1604, the following rule is given:

> "Conflicting or contradictory instructions furnish no correct guide to the jury, and the giving thereof is erroneous. Instructions of this character are misleading, as the jury are not supposed to know when the judge states the law correctly and when incorrectly; and the jury should not be left to reconcile conflicting principles of law. The giving of contrary instructions is ordinarily held ground for reversal. Error in giving incorrect instructions is not cured by giving correct instructions in conflict with them. The error can only be cured by an explicit withdrawal of the erroneous instruction. Where instructions are inconsistent and contradict each other, it is usually impossible to say whether the jury was controlled by the one or the other."

In 2 R. C. L., page 260, it is stated:

> "The doctrine of harmless error is seldom applied to the giving of conflicting instructions, and as a general rule the vice of a wrong rule in a charge is not extracted by the fact that the right rule is also given, because it is impossible to tell by which rule the jury was governed."

Armour & Co. v. Russell, 144 Fed. 614;

6 L. R. A. (N. S.), 602;

Deserant v. Ceriollos Coal Co., 178 U. S. 409.

The rule is laid down in Hayne on New Trial and Appeal, Vol. 1, at page 648 as follows:

> "Where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, whatever the verdict, to know that the jury was not influenced by that instruction which was erroneous, as the one or the other must necessarily be where the two are repugnant."

This rule as laid down by Hayne is in practically the exact words used by Crockett, J., delivering the opinion in *Brown v. McCallister,* 91 Cal. 48. Our Supreme Court has consistently followed this rule throughout the California decisions, a number of which were cited and reviewed in our opening brief.

In the case of *Armour & Co. v. Russell, Supra,* the appeal arose directly over exceptions taken to request of counsel for the giving of certain instructions which were offered apparently to correct or add to those given by the trial judge.

Justice Sanborn of the Circuit Court of Appeals, 8th circuit, who wrote the opinion, states as follows:

> "It is true that in some parts of the charge the court stated the true rule on this subject to the jury. The presumption, however, is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an error challenged, did not prejudice and could not have prejudiced the complaining party; that the rule that error without prejudice is no ground for re-

versal is applicable." Citing numerous Federal and U. S. cases.

This further excerpt is taken from page 616 of the opinion:

> "The vice of a wrong rule in a charge of the court is not extracted by the fact that the right rule was also given therein, because it is impossible to tell by which rule the jury was governed."
>
> Railway Co. v. Needham, 52 Fed. 371;
>
> Railroad Co. v. Farr, 56 Fed. 994.

In the case of Chicago, S. P., M. & O. Co. v. Kroloff, 217 Fed. Rep. 525, the court stated:

> "A refusal of the court to grant a specific request to withdraw from the jury one of several specific charges of negligence on which the plaintiff is seeking to recover, is fatal error, if there is no substantial evidence to sustain that charge, although there may be evidence to sustain others, because the presumption is that error produces prejudice. The Appellate Court cannot know that it was not upon that baseless charge that the jury founded is verdict." Citing a large number of Federal cases.

In the case of *Todd v. U. S.*, 221 Fed., at page 208, we quote from the opinion as follows:

> "Counsel for plaintiff contended that the error of the admission of this petition is so slight and technical, and the guilt of the defendant is also conclusively proved by other evidence that the error should be deemed without prejudice to the defendant, and the judgment against him should

be affirmed. BUT THE LEGAL PRESUMPTION IS THAT ERROR PRODUCES PREJUDICE, IT IS ONLY WHEN THE FACT SO CLEARLY APPEARS AS TO BE BEYOND DOUBT THAT AN ERROR WOULD NOT PREJUDICE AND COULD NOT HAVE PREJUDICED THE COMPLAINING PARTY, THAT THE RULE THAT ERROR WITHOUT PREJUDICE IS NO GROUND FOR REVERSAL CAN HAVE EFFECT. Citing numerous authorities."

The same rule is laid down in numerous cases cited in

Pettine v. Territory of N. M., 201 Fed., page 492.

In the case of Gibboney Sand Bar Co. v. Pulaski, 24 L. R. A. (N. S.) page 1185, the only point involved on the appeal was a question of conflict in various instructions given to the jury. Counsel for plaintiff argued that there had been no prejudice by the contradiction appearing. The court stated in answer:

"In this view we cannot concur the doctrine of harmless error is seldom, if ever, applied to conflicting instructions on a material point for the all sufficient reason that the court cannot say whether the jury was guided by the correct or incorrect instructions." Citing numerous cases.

In the case of Hessler v. Calif. Hospital Co., 178 Cal. 764, the court at page 768 said:

"The court below in other instructions stated the rule by which the defendants were bound accurately and clearly. There is a clear conflict in the instructions. We are unable to determine which set of rules the jury followed."

In the case of *Pierce v. U. S. Gas and Elec Co.,* 161 Cal. 176, the court stated at page 184:

> "It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant, and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict and such is the rule in this state. (See Killelea v. California etc. Co., 140 Cal. 602.) * * * It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instructions the jury followed in ariving at a verdict in favor of plaintiff."

In the case of *Starr v. Los Angeles Ry. Corporation,* 201 Pac. 599, the court at page 603 said:

> "It is true as respondent points out that the instructions are to be construed together, but where the instructions are flatly contradictory as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of plaintiff or defendant, and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed, and

the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in the evidence the verdict was reached."

And again in the case of *Noce v. United Railroads,* the court at page 222 said:

"Where two instructions are contradictory in essential parts, the judgment must be reversed."

Hayden v. Constantinople Mining & Dredging Co., 3 Cal. App. 136.

In the case of Sappenfield v. Main St. Etc. R. R. Co., 91 Cal. 48, the court at page 59 says:

"The error in giving the foregoing instruction was not obviated by the instruction subsequently given at the instance of the defendant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided, and if the several instructions are inconsistent or contradictory, it is impossible to tell which was adopted by them in reaching their verdict."

This principle is supported by great weight of authority and is so uniformly followed throughout the various states in this Union that there seems to be little necessity for extending this brief to any greater length by citing or reviewing further cases.

Respectfully submitted,

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The undersigned, H. L. Dunnigan, one of the counsel for the plaintiffs in error, hereby certifies that the foregoing petition for rehearing is, in his judgment, well founded in law and that it is not interposed for delay.

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By H. L. DUNNIGAN,
Counsel for Plaintiff in Error.